EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 85-894

Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

O. L. MCCOTTER,

Petitioner,

v.

EMMITT CHARLES LYONS,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Jon R. "Randy" Farrar*
Staff Attorney

Sharon Kutzschbach
Staff Attorney

Staff Counsel for Inmates
Texas Department of Corrections
P. O. Box 99
Huntsville, Texas 77340
(409)294-2369

*Attorney of Record

QUESTION PRESENTED

WHETHER RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS DEFENSE ATTORNEY'S FAILURE (1) TO OBJECT TO THE ADMISSION OF THE DETAILS OF A PRIOR AGGRAVATED ROBBERY CONVICTION, AND (2) TO ASK FOR A LIMITING INSTRUCTION.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Course of the Proceedings and Disposition Below 2

B. Statement of Facts 2

SUMMARY OF ARGUMENT 5

ARGUMENT AND AUTHORITIES 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases	Page
Fitzgerald v. Estelle, 505 F.2d 1334 (en banc) (5th Cir. 1975) . .	8
Garland v. Maggio, 717 F.2d 199 (5th Cir. 1983)	6
Murphy v. State, 587 S.W.2d 718 (Tex. Crim. App. 1979)	7
Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984) . .	5,6,8
U.S. v. Cisneros, 491 F.2d 1068 (5th Cir. 1974)	7
U.S. v. Walker, 497 F.2d 1050 (5th Cir. 1974)	7
Walls v. State, 548 S.W.2d 38 (Tex. Crim. App. 1979)	7
Constitutions, Statutes and Rules	
U.S. Const. Amend. VI	1

NO. 85-894

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

O. L. MCCOTTER,

Petitioner,

v.

EMMITT CHARLES LYONS,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Emmitt Charles Lyons, Respondent, by and through his attorney, Jon R. "Randy" Farrar, and files this brief in response to O. L. McCotter's Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent is in the custody of the Texas Department of Corrections pursuant to a conviction from the 86th Judicial District Court of Kaufman County, Texas, in Cause No. 13,987 styled The State of Texas v. Emmitt Charles Lyons. Respondent was charged with the offense of aggravated robbery, to which he entered a plea of not guilty. Respondent was tried by a jury which, after two days of deliberation, found him guilty of the offense charged and assessed punishment at forty (40) years in the Texas Department of Corrections.

The Respondent effected a direct appeal from his conviction, and the Court of Appeals, Fifth Supreme Judicial District of Texas at Dallas, affirmed the conviction in an opinion delivered on May 13, 1983. Lyons v. State, No. 05-82-166-CR. The Respondent has also filed two applications for habeas corpus relief pursuant to Article 11.07, Texas Code of Criminal Procedure. These applications were denied by the Texas Court of Criminal Appeals on July 4, 1982, and December 1, 1983, respectively.

Thereafter, Respondent filed a Writ of Habeas Corpus, 28 U.S.C. §2254, with the United States District Court for the Northern District of Texas in Dallas on May 17, 1984, upon which Magistrate Sanderson recommended that relief be granted (Appendix A).[1] On November 13, 1984, the Court adopted the findings, conclusions and recommendations of the magistrate and granted the writ, finding that the Respondent was denied effective assistance of counsel (Appendix B). On September 13, 1985, the United States Court of Appeals for the Fifth Circuit affirmed the decision (Appendix D). Petitioner thereafter failed to timely request a stay of the mandate, and the Court of Appeals denied Petitioner's Motion to Recall the Issuance of the Mandate (Respondent's Appendix A).

B. Statement of Facts

The complainant, Shelba Jean Holloway, testified that while working at FasGas in Terrell, Texas on August 31, 1981, at approximately 2:30 p.m., she was robbed at gunpoint. The evidence adduced through Ms. Holloway consisted

---

[1] Unless otherwise indicated, all citations to appendices refer to the appendices attached to Petitioner's Petition for Writ of Certiorari.

of her in-court identification of the Respondent as being the person who robbed her, and that he not only took money from the service station register, but also took $125.00 from Ms. Holloway's purse as well (See Statement of Facts, Volume III of 4 volumes, at pages 6-8). The prosecutor relied solely upon the testimony of Ms. Holloway in its case-in-chief.

In cross-examination of the complainant, defense counsel established that on the day after the robbery she was shown a photographic lineup and was unable to identify the robber. On the following day, she was again shown a photographic lineup from which she this time identified Respondent (SF III 22). In an attempt to impeach her identification of Respondent as the robber, counsel confronted the witness with the photos she was shown at the second lineup and established that the only photo which bore the word "Texas" and a six-digit number was that of Respondent (SF III 23-25). Despite defense counsel's attempt to discredit witness's identification, she remained steadfast in her belief she had been robbed by the Respondent (SF III 30-31, 34).

In defending the case, the Respondent first called Don R. Echols, a Terrell Police Department Detective, who previously testified in a suppression hearing (See No. 13,987, S.O.F. Pre-trial Hearing) wherein it was disclosed that only the Respondent's picture in the photographic spread had numbers across the subject's chest. The apparent purpose of this question was to suggest that this fact influenced Ms. Holloway's selection of the Respondent's photograph from the spread. During counsel's examination of Mr. Echols, he referred to other pictures displayed to Ms. Holloway as mug shots (e.g. S.O.F., Volume III, page 46,51). In other parts of the officer's examination, counsel established that the witness was familiar with the Respondent's prior criminal record and that the witness obtained the Respondent's picture from his parole officer (Id., pages 50-51). The existence of the Respondent's past criminal record was also elicited from Det. Echols with reference to an offense report (Id., page 47).

Following this direct examination, Respondent's counsel, in the jury's absence, made an objection to any attempt by the prosecutor to elicit the specifics of the respondent's criminal record (Id., pages 52-53). The trial

judge did not rule on the objection, but directed counsel to reurge the objection when the question was asked (Id., page 53). When the prosecutor posed the question, Echols testified without objection that the Respondent had previously been convicted for robbery (Id., page 54). After Respondent's counsel elicited from the witness that he had received an anonymous tip that the Respondent was the robber (Id., page 53) and after Echols had been excused as a witness, Respondent's counsel moved for a mistrial, which was overruled by the trial court (Id., page 61).

The remaining witnesses called by the Respondent were called to establish an alibi defense and in part to undermine the victim-witness's description of the Respondent's clothing at the time of the robbery. The testimony generally established that the Respondent had been at the offices of the Texas Employment Commission and the Terrell State Hospital, both at Terrell, Texas, on the morning and early afternoon of the robbery of the FasGas service station at Terrell on August 31, 1981.

In direct contradiction to Ms. Holloway's testimony that the Respondent had robbed her at gunpoint at 2:30 p.m., the Respondent called Janet White and Jimmy Oliver, both of whom testified to the Respondent's presence at the Kennedy Heights Apartments in Terrell, Texas between two and three o'clock.

In rebuttal, the State called Brenda Shifflett to rebut the testimony offered by the Respondent that he did not arrive at the T.E.C. office until after 11 a.m. Janet White was also recalled to establish that she had previously been convicted of a misdemeanor offense involving moral turpitude.

In the argument portion of the trial, the prosecutor, again without objection, called to the jury's attention that the Respondent had already been convicted once for the offense of aggravated robbery (Id., page 179) and alluded to the Respondent's prior criminal record in two instances (Id., pages 182, 184).

SUMMARY OF ARGUMENT

Respondent was denied the effective assistance of counsel. Notwithstanding his inadequate preparation for trial and lack of understanding of how to effectively develop trial tactics, the Respondent's trial attorney was ineffective primarily because he failed to protect the Respondent's right from being tried and convicted herein based upon his prior criminal record; more particularly:

1. For his failure to make an objection when the state delved into the Respondent's past criminal record and thereby preserve the objection for Appellate review;[2]
2. For his failure to request a limiting instruction on how the jury was to use the evidence of the Respondent's prior criminal record;
3. For his failure to request a limiting instruction concerning the Respondent's prior conviction at any time during the trial, particularly when the State twice referred to his prior conviction in closing arguments.

The Petitioner attempts to dismiss the Respondent's claims as being merely trial tactics, and that according to the rule of Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052, 2066 (1984), such tactical choices are "virtually unchallengeable". The Petitioner asserts that the lower courts have erroneously granted relief based on tactical decisions. In characterizing the decisions of the lower court as such, the Petitioner has misread the opinions of the lower courts. Magistrate Sanderson indicated that the attempt to impeach the victim's identification was not in and of itself ineffectiveness:

> The peril-fraught attempt to impeach the victim's identification of the Petitioner cannot be said to have been a trial tactic so illchosen as to

---

[2] In his direct appeal brief Respondent's appellate attorney, being appointed after Respondent's trial, conceded that no objection had been made (See Brief of Appellant, Appeal No. 05-83-00166-CR, Ground of Error No. 2, at page 7; Ground of Error No. 3 at pages 10-11; Ground of Error No. 6, pages 21-22).

have permeated the entire trial with obvious unfairness. e.g. Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). (Appendix A, pages 6-7).

Respondent agrees that his trial counsel's use of the Respondent's past record in an attempt to discredit the complainant's identification of Respondent was indeed a trial tactic, albeit an unwise strategic decision. There is no argument with respect to whether this line of questioning was a trial tactic. Instead the thrust of the Respondent's argument and the lower courts' conclusions focuses on how trial counsel subsequently failed to properly limit the use of the evidence to preserve the Respondent's rights. Both the District Court and the Court of Appeals held that the source of ineffectiveness was the Defense Counsel's "failure to object at the proper time to the introduction of Lyons' prior conviction, or to seek to limit the use of such evidence . . ." (Appendix D, page 10). Consequently, the representation by Respondent's trial counsel was, using the words of the Court of Appeals, lacking in competence (Appendix D, page 12).

The Petitioner here has misrepresented the basis for the finding of ineffectiveness. The holding of the District Court and the Court of Appeals is not in conflict with Strickland v. Washington. Consequently, there is no need for the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AND AUTHORITIES

There are no special and important reasons for granting the writ. Both the District Court and the Court of Appeals applied the facts to requirements announced in Strickland v. Washington. In Strickland, the Court required two prongs to be satisfied to justify a reversal of a conviction based upon ineffective assistance of counsel:

1. The defendant must show that counsel's performance was deficient; and
2. The defendant must show that the deficient performance prejudiced the defense.

466 U.S. ____, 104 S.Ct. 2052, 2064 (1984).

Counsel's performance herein was deficient due to his failure to protect Respondent's rights regarding the disclosure of Respondent's past criminal record as heretofore explained. The prosecution cannot utilize a defendant's past criminal record in order to obtain a conviction. The rule in the fifth Circuit is that prior criminal records cannot be used unless the defendant takes the witness stand in his own defense, thereby putting his character in issue. U.S. v. Cisneros, 491 F.2d 1068 (5th Cir. 1974). In such instances a prior record can be introduced for impeachment purposes only. Moreover, in such cases, the jury must be instructed that the evidence might be considered only to the extent it affected the credibility of the defendant as a witness. U.S. v. Walker, 497 F.2d 1050 (5th Cir. 1974).

The Texas Court of Criminal Appeals has discussed the problems inherent in utilizing a defendant's past record:

> an accused's "propensity to commit crimes" is not an issue which is material to whether he is guilty of the specified conduct charged by the State; it follows therefore, that introduction of evidence establishing such a propensity constitutes a trial of the accused as a 'criminal generally' which offends our system of justice. Murphy v. State, 587 S.W.2d 718, 721 (Tex. Crim. App. 1979).

A conviction must be reversed when a defendant has been tried as a criminal generally. Walls v. State, 548 S.W.2d 38 (Tex. Crim. App. 1979).

Trial counsel realized he needed to object when the judge told him he would have to wait until the State posed its questions. Counsel, however, failed object when the occasion arose. He failed furthermore to ask for a limiting instruction. Regarding the ultimate admission of this evidence without either objection or a limiting instruction, Magistrate Sanderson concluded:

> Its admission was extremely prejudicial which became all the more pronounced by the absence of any limiting instruction. Under the circumstances presented, the trial court may have been required sua

sponte to insure that the [Respondent's] Fourteenth Amendment due process rights were protected. e.g. Fitzgerald v. Estelle, 505 F.2d 1334, 1337-1338 (en banc) (5th Cir. 1975).

Herein the trial counsel's representation was clearly deficient.

The second prong in Washington v. Strickland, supra, is whether counsel's deficient performance prejudiced Respondent. Petitioner has not challenged the findings of the courts with respect to prejudice. Considering the totality of the circumstances, prejudice should be found. The witnesses in the Respondent's behalf presented a clear alibi. Moreover, the jury needed two days to reach their decision. Obviously the decision was a close call and not made without debate. In arriving at a decision, the jury was not prevented from treating the Respondent as a criminal generally -- particularly as a criminal who had previously committed the same type of crime in which he was now accused. Finally, the Court of Appeals once again pointed out that the finding of prejudice by the trial court had not been challenged by the State (Appendix D, page 8).

CONCLUSION

For these reasons, Respondent prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

Emmitt Charles Lyons
Respondent

BY: Jon R. Farrar

Jon R. "Randy" Farrar
Attorney for Respondent

Staff Counsel for Inmates
Texas Department of Corrections
P.O. Box 99
Huntsville, TX 77340
409/295-6371 Ext. 369
Texas Bar No. 06834300